DEPARTMENT OF THE AIR FORCE
Washington

Office of the Secretary

Dear Mr. Chairman:

I refer to your recent request to the Secretary of Defense for the views of the Department of Defense on S. 1489, 86th Congress, a bill "To amend title 28 of the United States Code to provide for certain judicial review of administrative removals and suspensions of Federal employees". The Secretary of Defense has delegated to the Department of the Air Force the responsibility for expressing the views of the Department of Defense thereon.

The purpose of S. 1489 is to extend the jurisdiction of the district courts specified in the bill to cover "appeals" of Federal civilian employees for reinstatement or restoration to duty, and for compensation for the period of removal or suspension, when "the appropriate administrative authority" has directed their removal or suspension from the service. The bill further provides that any such appeal shall be filed within sixty days after the date of the final administrative action in the court having jurisdiction where the appellant is employed, or in the District Court for the District of Columbia, and that the appropriate officer or agency of the United States shall respond to any such suit wherever initiated.

The Department of Defense is opposed to the enactment of S. 1489.

At the present time a suspended or discharged Federal employee has a right to file a complaint in the District Court for the District of Columbia to determine whether he has been afforded all the procedural rights in the course of administrative review to which he is entitled under both Statutes and Departmental regulations. The District Court for the District of Columbia is the only district court now having jurisdiction to hear such disputes. Blackmar v. Guerre, 342 U.S. 512; Reeber v. Russell, 200 F.2d 334; Payne v. McKee, 153 F. Supp. 932. The basis for this rule is that the head of an agency, as the statutory appointing authority, is an indispensable party to any action seeking restoration to employment, and that only the District Court for the District of Columbia has jurisdiction over the person of agency heads with headquarters at the seat of Government.

The bill would clearly confer authority on all Federal district courts to hear cases arising within their geographic areas at least to the same extent as is now the case for the District Court for the District of Columbia, notwithstanding the fact that there may be no personal jurisdiction over the agency head. The Department of Defense feels that it would not be in the best interests of the United States to modify existing provisions for judicial review of procedural matters on removal and suspension actions. Enactment of S. 1489 would have the effect of reinstituting the many problems of diversity of judicial interpretation which arose under the so-called Tucker Act and which led to its modification to exclude Federal employment matters.

The bill would also combine a reinstatement action with a claim for back pay in order to free a plaintiff from pursuing two remedies, one before the District Court and the other before the United States Court of Claims. In view of the considerable experience gained by the latter in actions involving compensation of Federal employees, the Department of Defense believes that the present exclusive jurisdiction of the Court of Claims over pay matters should be preserved. This is especially so considering that S. 1489 would give back-pay jurisdiction to district courts generally, instead of restricting it to the District Court for the District of Columbia.

As to the subject matter appropriate for judicial review, an employee may secure review of his removal or suspension based upon an allegation that he has been denied the benefit of an essentially procedural right. Boylan v. Quarles, 235 F. 2d 834; Love v. U.S. 98 F. Supp 770, cert denied 342 U.S. 866. Even though the remarks of Senator Keating when he introduced S. 1489 (Congressional Record, 20 March 1959, 4225), and the disclaimer in lines 22 and 23 of page 2 of the bill, disavow any intent to expand the scope of judicial review, the bill is still subject to the possible misinterpretation that it permits trial de novo of suspension or removal actions on their merits. Should S. 1489 be enacted despite the opposition of the Department of Defense, it should be amended so as to indicate unmistakably that it does not enlarge the jurisdiction of U. S. District Courts beyond that which presently exists in the U. S. District Court for the District of Columbia in such cases.

The following additional technical deficiencies are noted for possible correction. The reference to "the District Court for the Territory of Alaska", should be deleted in lines 6 and 7, page 1. The bill should include language that would add a new section catch line, "1361. Removals and Suspensions of Federal Employees", to the analysis of chapter 85, title 28, United States Code. Some of the language of the bill seems to be ambiguous. The phrases, "final action by the appropriate administrative authority for the removal or

suspension" (lines 2, 3, and 4, page 2) and "date of final administrative action" (line 10, page 2), are not defined, thus making these statements vague and confusing with respect to who or what is final administrative authority or final administrative action. Finally, use of the term "appeals" throughout the bill is confusing, since that word normally connotes continuation of a single transaction. In a removal or suspension case, the transaction is completed upon decision by the appointing officer subject to whatever further administrative review is provided by statute. Initiation of litigation to reverse that decision, or to secure restoration of compensation, constitutes a new and independent action which should be described as a "suit" rather than as an "appeal".

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

Honorable James O. Eastland
Chairman, Committee on Judiciary
United States Senate